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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1424

DAVID EMERY SERFASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-34) is reported at 492 F.2d 388. The opinion of the district court (Pet. App. 16-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1974. The petition for a writ of

certiorari was filed on March 22, 1974, and was granted on April 22, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars an appeal by the United States from an order, entered prior to the empanelling of a jury, dismissing an indictment on the basis of a legal ruling by the district court after examination of records and affidavits setting forth the evidence to be adduced at trial.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

18 U.S.C. 3731 provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

On October 11, 1972, a grand jury empaneled in the United States District Court for the Middle District of Pennsylvania returned an indictment charging petitioner, David Emery Serfass, with wilfully failing to report for induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). Prior to trial, petitioner moved to dismiss the indictment on the ground that the local board had failed to state adequate reasons for its refusal to reopen petitioner's classification to consider a post-induction-order claim for treatment as a conscientious objector (App. 2-5). The district court granted the motion (Pet. App. 15-18), and the United States appealed to the court of appeals under the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1890. The court of appeals rejected petitioner's claim that an appeal was barred by the Double Jeopardy Clause. On the merits, the court of appeals reversed the order dismissing the indictment and remanded the case for trial or other further proceedings in accordance with its opinion (Pet. App. 25-34; App. 19).

1. The material facts are not in dispute. On December 18, 1970, petitioner was ordered to report for induction on January 18, 1971 (App. 7). After receiving the order, petitioner filed an application for classification as a conscientious objector. On Jan-

uary 14, 1971, after an interview with the local board, petitioner was advised that the local board had considered his entire file at their meeting the previous day and that they had agreed unanimously "that there was no change over which you had no control" and that it had therefore "decided not to reopen your file" (App. 9). On January 18, 1971, petitioner failed to report for induction as ordered. The present indictment followed.

2. Prior to trial, petitioner filed two motions. Petitioner moved to dismiss the indictment on the ground that the local board did not state adequate reasons for its failure to reopen his classification (App. 2-3). At the same time, petitioner moved "to postpone the trial of the within matter which is now scheduled for January 9, 1973, for the reason that a Motion to Dismiss has been simultaneously filed and the expeditious administration of justice will be served best by considering the Motion prior to trial" (App. 10).

On January 5, 1973, the district court granted the motion to postpone the trial (App. 11), and ordered that oral argument on the motion to dismiss be heard on February 6, 1973 (App. 12). After hearing oral argument, the district court entered an order, which was complied with, directing the parties to submit a copy of petitioner's Selective Service File (App. 13). On July 16, 1973, the district court ordered that the indictment be dismissed (App. 15). After setting out the material facts, which were "derived from defendant's affidavit in support of his motion, from his

Selective Service file, and from the admissions of counsel" at oral argument to the effect that "the information which Serfass submitted to the Board establishes a prima facie claim for conscientious objector status based upon late crystallization" (Pet. App. 17-18), the district court held that petitioner was "entitled to full consideration of his claim prior to assignment to combatant training and service. *Ehlert* v. *United States*, 1971, 402 U.S. 99, 103-04 and n. 7, 107" (Pet. App. 18). Since "the statement of reasons given for refusing to reopen [was found to be] sufficiently ambiguous to be reasonably construed as a rejection on the merits, thereby prejudicing [petitioner's] right to in-service review," the district court granted the motion to dismiss the indictment (Pet. App. 18).[1]

3. The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1890. The court of appeals unanimously rejected petitioner's claim that it was without jurisdiction to hear the appeal and reversed the order of the district court on the merits. Speaking to the issue of appealability, the only issue raised by the

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[1] The concern of the district court—that petitioner's right to in-service review would be prejudiced by the local board's rejection of his claim—was apparently based upon Section 3.b(2) of Army Regulation 635-20, which states that in-service claims for conscientious objector treatment will not be considered favorably when "based solely on conscientious objection claimed and denied by the Selective Service System prior to induction." See *Musser* v. *United States*, 414 U.S. 31.

petition for a writ of certiorari, the court of appeals found that cases construing the old Criminal Appeals Act to preclude an appeal in similar circumstances were inapposite. It held that "[t]he 1971 amendment to § 3731 * * * was clearly intended to enlarge the Government's right to appeal to include all cases in which such an appeal would be constitutionally permissible" (Pet. App. 23). Accordingly, it concluded that "[c]ases decided under the prior version of § 3731 are of little aid in determining appealability under the present version" (*ibid.*).

Moreover, relying on its earlier opinion in *United States* v. *Pecora*, 484 F.2d 1289 (C.A. 3), the court of appeals also held that an appeal in this case was not barred by the Double Jeopardy Clause. In *Pecora*, the court of appeals, discussing the appealability of a pretrial dismissal, held that "absent the defendant's waiver of his right to a jury trial pursuant to Rule 23(a) of the Federal Rules of Criminal Procedure, jeopardy does not attach until the jury has been impaneled and sworn" (Pet. App. 24). Although *Pecora* involved a pretrial dismissal based upon a stipulated statement of facts "raising a legal issue," the court of appeals found that there was no meaningful distinction between the situation here and that in *Pecora* (Pet. App. 24-25):

> Although the instant dismissal was based upon the trial court's finding that the defendant had established a defense as a matter of law, rather than upon the finding as in *Pecora*, that there were insufficient facts as a matter of law to support a conviction, we see no significant constitutional difference between the two situations. Both involved a determination as to the legal sufficiency of certain facts, and in either case denial of the motion to dismiss entitled the defendant to the jury trial which he has not waived. We therefore hold that jeopardy did not attach and the dismissal of the indictment in the instant case was an appealable order.

Turning to the merits, the court of appeals, relying upon *Musser* v. *United States*, 414 U.S. 31, held that, since the local board was without power to rule on the merits of a post-induction-order conscientious objector claim, petitioner's right to in-service review of his late crystallization claim was not prejudiced. Accordingly, the order dismissing the indictment was reversed and the case remanded to the district court "for trial or other proceedings consistent with this opinion" (Pet. App. 31-34).

4. On March 22, 1974, a petition for a writ of certiorari was filed, limited solely to the issue whether the order of dismissal was appealable. Petitioner contended that the construction of Section 3731, "as applied by the Third Circuit Court of Appeals in this case, has put the defendant, your Petitioner, in jeopardy in violation of the clear import of the statute itself and the United States Constitution" (Pet. 5). Since there is a conflict among the courts of appeals over the issue whether the Double Jeopardy Clause permits an appeal from a pretrial order dismissing an indictment on the merits, the United States did

not oppose the petition for a writ of certiorari (Memorandum for the United States, pp. 12-13).

SUMMARY OF ARGUMENT

The Criminal Appeals Act, 18 U.S.C. 3731, provides for an appeal by the United States to the court of appeals "from a decision, judgment, or order of a district court dismissing an indictment * * * except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The statute, as it presently reads, was enacted in 1971 and was intended to "assure that the United States may appeal [to the court of appeals] from the dismissal of a criminal prosecution by a district court in all cases where the Constitution permits" (S. Rep. No. 91-1296, 91st Cong., 2d Sess., pp. 2-3). Moreover, Congress explicitly indicated its intent that the United States be permitted to appeal from pretrial dismissals of indictments in selective service cases based on a "finding that there have been errors by draft boards" (*id.* at 14).

It is therefore clear that the appeal by the United States to the court of appeals in this case was proper unless the Double Jeopardy Clause bars an appeal from a pretrial order dismissing an indictment on the merits. Although petitioner had moved for and obtained a continuance of the trial pending the determination of his motion to dismiss the indictment, and although it is undisputed that a jury trial had not been waived and that petitioner

was not in jeopardy of conviction at the time the motion to dismiss was granted, he argues "that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively, jeopardy had attached" (Br. 5). This claim rests upon misconception of the history and language of the Double Jeopardy Clause as well as the significant considerations of policy that it reflects.

"The constitutional prohibition against 'double jeopardy,'" as this Court has held, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense"; it therefore prohibits the state from making "repeated attempts to convict an individual for an alleged offense, [and] thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188.

These considerations have led to the adoption of the rule that a defendant has been placed in jeopardy only upon the commencement of a trial before the trier of fact. It is obvious, merely in stating the rule and the considerations it reflects, that petitioner, who was never tried and who was never in jeopardy of having a judgment rendered against him by the trier of fact, cannot invoke the protection of the Double Jeopardy Clause. Petitioner was not subject to

the "heavy personal strain which a criminal trial represents for the individual" nor was he subject to the "embarrassment, expense and ordeal" of a trial.

Under these circumstances, every opinion of this Court construing the Double Jeopardy Clause with reference to government appeals has held that an appeal will lie from a pretrial dismissal of an indictment, regardless of whether the dismissal is based on the sufficiency of the evidence or on some other defense to the indictment (*e.g.*, statute of limitations) that has the effect of ending the case and exculpating the defendant. Like the English cases construing the common law rule, from which the Double Jeopardy Clause was derived, these decisions of this Court implicitly reject the argument that there is any such thing as the "equivalent of an acquittal" when a defendant has never been tried and placed in jeopardy. Simply put, then, the decisions of this Court uniformly support the proposition that petitioner could not stave off the government's appeal by relying on *double* jeopardy considerations when he has yet to be placed in jeopardy at all.

Petitioner's brief largely ignores the overwhelming authority sustaining the right of the United States to appeal from the pretrial order dismissing the indictment here. The arguments he does advance are derived principally from the opinions of some courts of appeals which have held or suggested that the Double Jeopardy Clause does not permit an appeal from a pretrial order dismissing an indictment on the merits. These cases have reached this conclusion

on various grounds, including (1) that jeopardy attaches to an acquittal, (2) that the doctrine of *res judicata*, which is applicable to criminal as well as civil proceedings, bars an appeal by a party from an adverse judgment, (3) that the Double Jeopardy Clause was intended to limit the number of times a defendant may be required to submit proof of his innocence and that the conduct of a pretrial hearing on stipulated facts constitutes such an occasion, and (4) that permitting an appeal from a pretrial order will only encourage defendants to delay their motion to dismiss until jeopardy has attached.

These theories are unsound as a matter of law and policy and are inconsistent with holdings of this Court and policies reflected by the Double Jeopardy clause: (1) Jeopardy does not attach to an acquittal; on the contrary, the acquittal (or conviction) ends the jeopardy that attached upon the commencement of trial. (2) The doctrine of *res judicata* bars a second indictment only where the order dismissing the first indictment has not been successfully appealed or set aside; *res judicata* has no bearing on questions of appealability. (3) The Double Jeopardy Clause is applicable only where the defendant has been put to trial before a trier of fact capable of convicting him; the clause was plainly intended to limit the number of times a defendant could be *tried* for the same offense, but pretrial consideration of a legal issue on the basis of stipulated facts simply is not a trial. (4) Because the Double Jeopardy

Clause will not afford protection against a second trial where a defendant has deliberately allowed himself to be placed in jeopardy and then voluntarily asked the district court to terminate the trial on grounds that could have been determined prior to the time jeopardy attached, permiting an appeal from a pretrial order will not encourage defendants to delay their motions to dismiss until after jeopardy attaches. In any case, petitioner's argument goes not to the Double Jeopardy Clause but to the policy of the statute and is thus foreclosed by Congress's decision to permit the appeal.

There are, therefore, no sound reasons to depart from the well established rule—going back to the first holding of this Court to consider the issue [2]—that the United States may appeal from any pretrial order terminating a prosecution in favor of an accused.

ARGUMENT

I. THE CRIMINAL APPEALS ACT AUTHORIZES AN APPEAL TO A COURT OF APPEALS FROM ANY PRETRIAL ORDER DISMISSING AN INDICTMENT

The Criminal Appeals Act, 18 U.S.C. 3731, provides for an appeal by the United States to the court of appeals "from a decision, judgment, or order of a district court dismissing an indictment * * * except that no appeal shall lie where the double jeopardy clause * * * prohibits further prosecution." This explicit language, and the specific mandate of Congress that "[t]he provisions of this section shall be liberally construed to effectuate its purposes," were

[2] *Kepner* v. *United States*, 195 U.S. 100.

added by Congress in 1971 in order to overcome the restrictive construction that had been placed on the pre-1971 version of the Criminal Appeals Act.

Prior to the 1971 amendments, Section 3731 authorized an appeal to the court of appeals from "a decision or judgment setting aside, or dismissing any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this section." This provision was generally construed as authorizing appeals to the court of appeals only from dismissals due to a defect in the indictment or in the institution of the prosecution. The legislative history of former Section 3731, which was said to reflect a policy against permitting appeals in criminal cases by the United States, was cited as justification for ignoring what was acknowledged to be the plain language of the old Criminal Appeals Act. See, *e.g.*, *United States* v. *Apex Distributing Company*, 270 F.2d 747 (C.A. 9); *United States* v. *DiStefano*, 464 F.2d 845, 847 (C.A. 2).

Accordingly, it was held that the United States could not appeal to the courts of appeals from pretrial orders dismissing indictments in cases in which the district court had determined on the basis of stipulated or undisputed facts that there was a valid defense to the indictment, as well as when the dismissal was for failure to prosecute or was predicated on the failure of the United States to comply with a discovery order. *United States* v.

Apex Distributing Company, supra, 270 F.2d at 751; *United States* v. *DiStefano, supra*, 464 F.2d at 848; *United States* v. *Ponto*, 454 F.2d 647 (C.A. 7); *United States* v. *Findley*, 439 F.2d 970 (C.A. 1).

Since many of these orders could not be appealed directly to this Court under the provisions of former Section 3731 (see *United States* v. *Sisson*, 399 U.S. 242),[3] and since often, when such an appeal was possible, the issue was not of sufficient importance to justify review by this Court, Congress determined to amend Section 3731 to "assure that the United States may appeal [to the court of appeals] from the

[3] The old Criminal Appeals Act, 18 U.S.C. (1964 ed.) 3731, provided in part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
> * * *

dismissal of a criminal prosecution by a district court in all cases where the Constitution permits." S. Rep. No. 91-1296, 91st Cong., 2d Sess., pp. 2-3.[4]

[4] Congress took particular notice of the manner in which the old Criminal Appeals Act had been construed (*id.* at 5-6):

> * * * [T]he Criminal Appeals Act, as interpreted today, does not provide for an appeal by the United States to any court in a large variety of cases where the dismissal is based on grounds having nothing to do with any defect in the indictment, or the construction or invalidity of the underlying statute. For example, if a court issues an order for discovery, believed to be unauthorized, a court will dismiss the indictment if the prosecutor refuses to comply. There is at present no way the prosecution can test the validity of that dismissal and the underlying order. If a court dismisses an indictment for lack of timely prosecution under the Federal Rules, without finding a denial of the constitutional right to a speedy trial, the Government has no right to appeal. * * * Also, the statute, passed at a time when the range of Federal prosecutions was considerably narrower, fails to take into account the current necessity of reviewing administrative records in connection with a criminal prosecution—an outgrowth of the tremendous expansion of administrative agencies, particularly the establishment of the Selective Service System, since 1907. This has given rise to situations which do not readily fit into categories of pleadings recognized at the time the act was first passed.

In fact, Congress indicated specifically its desire to provide for appeal in cases such as this (*id.* at 14):

> The problems of appealability have recently become especially serious in selective service cases where judges have reviewed defendants' selective service files before trials and dismissed the indictments after finding that there have been errors by the draft boards. *These are issues to be determined by a judge, not a jury, and there is no reason why they should not be subject to appellate review.* The question of whether actions such as those resulting in selective service case dismissals are appealable to courts of appeals, if appealable at all, is currently being litigated. If it should be decided that such appeals lie only to the Supreme Court, this will make it difficult for the Government to take appeals in a large number of selective service cases which ought to be reviewed, because such decisions often turn on special, narrow facts and thus are not sufficiently important to warrant an appeal to the Supreme Court. [Emphasis added.]

The Criminal Appeals Act, as amended, plainly carries out the expressed intention of Congress. Section 3731 now provides, in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Act contains no exception precluding appeals from dismissals on the merits that rest not upon the sufficiency of the indictment alone, but upon facts outside the indictment. In order to avoid just such a narrow reading of the new act, similar to the interpretation that had been imposed upon the old act by judicial gloss, Congress specifically directed in the new Section 3731 that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." As the Senate Judiciary Committee observed, the "explicit expression of this intent" was added "in view of the restrictive judicial interpretations of congressional intent which have resulted from the histories of the earlier versions of section 3731 despite strong indications in the debate on the 1907 act that it should be broadly interpreted" (S. Rep. No. 91-1296, *supra*, at 18).[5]

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[5] We have referred extensively to this Senate Report because the amendments to the Criminal Appeals Act, which were enacted as part of the Omnibus Crime Control and Safe Streets Act of 1970, 84 Stat. 1880, were drafted by the Senate Judiciary Committee, and its "well considered and carefully prepared" report is particularly relevant in construing Section 3731. See *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, 395-396 (Jackson, J., concurring). We note, however, that while the amendments proposed by the Senate Judiciary Committee were adopted without change by the Senate, there was a modification made by the House-

Senate Conference Committee (H. Conf. Rep. No. 91-1768, 91st Cong., 2d Sess., p. 21).

The amendments to the Criminal Appeals Act as proposed by the Senate read as follows (S. Rep. No. 91-1296, *supra*, at 1):

> *Except as otherwise expressly provided by this section*, in a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information *or terminating a prosecution* in favor of a defendant as to any one or more counts, *except that no appeal shall lie from a judgment of acquittal.* [Emphasis added.]

The first and second italicized phrases were omitted altogether by the House-Senate Conference Committee, and the last phrase was modified so that the final version of the Act authorized an appeal from "a decision, judgment, or order of a district court dismissing an indictment or information as to one or more counts, but that no appeal shall lie in any case in which the Double Jeopardy Clause of the United States Constitution prohibits further prosecution." No explanation was given for the changes (H. Conf. Rep. No. 91-1768, *supra*, p. 21), but it may be surmised that they were intended to eliminate redundant language and more clearly express the intent of Congress.

The original version of the Act, providing that "no appeal shall lie from a judgment of acquittal," would have frustrated the expressed intent of the Senate Judiciary Committee to authorize appeals from pretrial dismissals of indictments based upon the application of legal principles to undisputed facts. The Committee also intended to authorize an appeal from such dismissals even after jeopardy attached (S. Rep. No. 91-1296, *supra*, at 11). These orders, however, had been characterized as "acquittals" for the purpose of determining their appealability under the old Criminal Appeals Act (see pp. 25-27, 34-35, *infra*), and accordingly there was a danger that the proviso to the Senate version of the Act would have been construed to bar an appeal from such orders. The language in the final version remedied that potential defect. Cf. *United States* v. *Pecora*, *supra*, 484 F.2d at 1293-1294, n. 6.

Accordingly, the courts of appeals are virtually unanimous in their agreement that the Criminal Appeals Act was intended to authorize an appeal from an indictment in all cases in which the Constitution would permit an appeal.[6] Moreover, while petitioner initially argued that the construction placed on Section 3731 by the court of appeals was "in violation of the clear import of the statute" (Pet. 5), he has now apparently abandoned that argument in the face of the language and legislative history of Section 3731.

II. THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR AN APPEAL FROM A PRETRIAL DISMISSAL OF AN INDICTMENT

The principal issue raised here—in light of the clear expression of congressional intent to permit government appeals in all cases in which the Constitution permits—is whether the Double Jeopardy Clause bars an appeal by the United States from a pretrial order of the district court dismissing an indictment on the merits. Although petitioner had moved for and obtained a continuance of the trial pending the determination of his motion to dismiss the indictment, and although it is undisputed that a jury trial had

[6] *United States* v. *Jenkins*, 490 F.2d 868 (C.A. 2), certiorari granted, May 28, 1974, No. 73-1513; *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (C.A. 5), certiorari denied, February 19, 1974, No. 73-743; *United States* v. *Walker*, 489 F.2d 1353 (C.A. 7); *United States* v. *Brown*, 481 F.2d 1035 (C.A. 8). But cf. *United States* v. *Southern Railway Co.*, 485 F.2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F.2d 606 (C.A. 6), certiorari denied, 413 U.S. 922.

not been waived and that petitioner was not in any jeopardy of conviction at the time the motion to dismiss was granted, petitioner argues "that because of the fact that the dismissal of the indictment was the functional equivalent of an acquittal on the merits, that constructively, jeopardy had attached" (Br. 5). This claim rests upon misconceptions of the history and language of the Double Jeopardy Clause, which, this Court has consistently held, does not come into play until the defendant has actually been placed in jeopardy by the empanelling of a jury (or, in non-jury trials, by the commencement of receipt of evidence). Moreover, petitioner's position receives no support from an examination of the significant considerations of policy that the guarantee against being "twice put in jeopardy" for the same offense is intended to reflect.

A. Jeopardy Does Not Attach In Pretrial Proceedings

Fundamentally, our position in this case comes down to a simple and, it seems to us, incontrovertible proposition: a defendant who has never been placed in jeopardy cannot avail himself of a claim of *double* jeopardy to block a goverment appeal.

The law is settled that jeopardy does not attach in pretrial proceedings that end in the dismissal of an indictment. This is so even when the dismissal is based on the insufficiency of the evidence or on a defense to the indictment that has the effect of ending the case and exculpating the defendant. In *Collins* v. *Loisel*, 262 U.S. 426, Mr. Justice Brandeis,

speaking for a unanimous Court, set out the basic rule from which this Court has never departed (*id.* at 429):

> The constitutional provision against double jeopardy can have no application unless a prisoner has, theretofore, been placed on trial. See *Kepner* v. *United States*, 195 U.S. 100, 126. The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. *Commonwealth* v. *Rice*, 216 Mass. 480. *People* v. *Dillon*, 197 N.Y. 254, 256. Even the finding of an indictment, followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing* v. *Cady*, 208 U.S. 386, 391, not to constitute jeopardy.

This principle is reflected in numerous cases under the old Criminal Appeals Act, pursuant to which the United States could appeal directly to this Court from, *inter alia*, a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy" (18 U.S.C. (1964 ed.) 3731). Although the "motion in bar" was never clearly defined (see *United States* v. *Sisson*, 399 U.S. 267, 300), it was generally held to encompass a pretrial order of the district court sustaining a defense to an indictment—on the basis of facts outside the indictment—the effect of which was "to end the cause and exculpate the defendants." *United States* v.

Hark, 320 U.S. 531, 536; *United States* v. *Blue*, 384 U.S. 251; see also *United States* v. *Murdock*, 284 U.S. 141; *United States* v. *Halseth*, 342 U.S. 277; *United States* v. *Covington*, 395 U.S. 57, 59, n. 2. Despite the fact that many of these pretrial orders were, in effect, dismissals on the merits and, under petitioner's analysis, "the functional equivalent of an acquittal," this Court repeatedly held that jeopardy had not attached because the defendants had not been put on trial. See, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 283, holding that "[t]he defendant in this case had not been put upon trial, therefore he had not been in jeopardy"; *United States* v. *Blue*, 384 U.S. 251, 253, holding that since the defendant "had not yet been brought to trial and put in jeopardy when dismissal occurred * * * our jurisdiction under the statute is secure * * *."

Particularly significant, in view of petitioner's reliance on the contention that the order in this case was unappealable because it was the "functional equivalent of an acquittal," are the cases under former Section 3731 that entertained jurisdiction over appeals from pretrial orders dismissing indictments on the ground that the statute of limitations had run (*United States* v. *Goldman*, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Barber*, 219 U.S. 72), even though such a pretrial dismissal on the merits has been characterized as an "acquittal." See *United States* v. *Barber*, 219 U.S. 77, 78; *United States* v. *Oppenheimer*,

242 U.S. 85, 88. Indeed, in *United States* v. *Zisblatt*, 172 F.2d 740 (C.A. 2), appeal dismissed, 336 U.S. 934, the court of appeals held that an appeal from a *post-trial* order of the district court that dismissed an indictment on statute of limitations grounds was not barred by the Double Jeopardy Clause.[7]

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[7] Speaking for the court, Judge Learned Hand wrote (172 F.2d at 743; footnotes omitted):

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy," but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed. So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.

Having concluded, however, that it was without jurisdiction to hear the appeal because a direct appeal to this Court was mandated by the "motion in bar" provision of former

Accordingly, it is settled law that, regardless of the label attached to an order dismissing an indictment, the Double Jeopardy Clause does not bar an appeal where, as here, the order was entered prior to trial and the error may therefore be corrected without a retrial. Indeed, in *Kepner* v. *United States*, 195 U.S. 100, the case most frequently cited for the proposition that the Double Jeopardy Clause bars an appeal from an acquittal, the Court was careful to distinguish between appeals from acquittals rendered by a jury after a trial and appeals from pretrial orders terminating prosecutions (195 U.S. at 130-131):

> It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, *but against being again tried for the same offense.*
>
> We are not here dealing with those statutes which give to the Government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused. *People* v. *Webb*, 38 California, 467. [Emphasis added.]

Section 3731, the court of appeals certified the case to this Court. The appeal was dismissed on the motion of the Solicitor General solely on the ground that the *statute* did not authorize an appeal from a post-jeopardy order. See *United States* v. *Sisson*, *supra*, 399 U.S. at 306.

See also *United States* v. *Taylor*, 207 U.S. 120, 127, where, in an opinion by Mr. Justice Holmes, the Court rejected a challenge to the right of the United States to appeal from a pretrial order terminating a prosecution in favor of the accused, indicating that there is no constitutional appealability problem prior to jeopardy:

> If the Fifth Amendment has any bearing, the act of 1907 [permitting an appeal] is directed to judgments rendered before the moment of jeopardy is reached. *Kepner* v. *United States*, 195 U.S. 100, 128. We think it is unnecessary to discuss the question at length.

United States v. *Sisson*, 399 U.S. 267, upon which petitioner principally relies, does not dictate a contrary result. There, unlike the instant case, the district court entered a *post-trial* order, which it denominated as an order "in arrest of judgment," in which it terminated the prosecution in favor of the defendant. The determination in *Sisson* that the government could not appeal from this order, because it was "in fact an acquittal," was predicated on the fact that the order of the district court was "bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial" (*id.* at 288). Accordingly, it

was held that the judge's action could not be distinguished from a directed judgment of acquittal entered notwithstanding a jury verdict of guilty under Rule 29(b) of the Federal Rules of Criminal Procedure (399 U.S. at 290) and that an appeal could not be taken from such a post-jeopardy order.

Here, on the other hand, the criminal prosecution was aborted prior to trial and before jeopardy attached. Even under the definition of an acquittal in *Sisson*—"a legal determination on the basis of facts adduced at the trial relating to the general issue of the case * * *" (*id.* at 290, n. 19)—the district court order here was not an acquittal. Since there was no trial, the dismissal was not a legal determination on "the basis of facts adduced at the trial."

Indeed, the motion to dismiss in this case was governed by Rule 12(b)(1), rather than Rule 29. Rule 12(b)(1) provides:

> Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

"A defense is thus 'capable of determination' if *trial* of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States* v. *Covington*, 395 U.S. 57, 60 (emphasis added). Here the district court (as distinct from the jury) had jurisdiction to determine a "defense" based on a claim that the local board improperly refused to reopen petitioner's classification; this was so precisely

because the claim was "capable of determination" without a trial of "the facts surrounding the commission of the alleged offense." In contrast to *Sisson*, where in order to determine the defense raised—whether the defendant was improperly denied treatment as a conscientious objector—the district court was required to consider "Sisson's testimony and demeanor at the trial" (399 U.S. at 301), here the facts upon which the pretrial order was based were undisputed and did not involve "the trial" of any issue of fact.

The "acquittal" rationale of *Sisson* is, therefore, plainly inapposite here (assuming *arguendo* that *Sisson's* conclusion that an appeal did not lie from an "acquittal" was based on the Double Jeopardy Clause[8]). Moreover, since the order in *Sisson* termi-

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[8] The holding of the Court in *Sisson* was that the order was an "acquittal" for the purpose of determining "this Court's jurisdiction over the appeal under 18 U.S.C., 3731 [1964 ed.]." *United States* v. *Jorn*, *supra*, 400 U.S. at 478, n.7. See also *id.* at 475-476; *United States* v. *Findley*, *supra*, 439 F.2d at 973. And it is plain from the legislative history of the 1971 amendments to the Criminal Appeal Act that Congress intended to overrule the construction that *Sisson* placed on former Section 3731. ("One example of the kind of case which would thereby be made appealable is the Sisson case" (S. Rep. No. 91-1296, *supra*, at 11)).

There is, as petitioner observes (Br. 8), also dictum in the opinion in *Sisson* to the effect that the Double Jeopardy Clause barred an appeal from the "acquittal" (399 U.S. at 290) even though the legal error could be corrected without a second trial. But this language, as we have shown, would not avail petitioner here, because it is limited to *post-trial* "acquittals." Indeed, in *United States* v. *Jenkins*, 490 F.2d 868 (C.A. 2), certiorari granted, May 28, 1974, No. 73-1513, which involved a post-trial order similar to that in *Sisson*, and

nating the prosecution was a post-trial and post-jeopardy order, it does not in any way undermine the basic rule summarized by Mr. Justice Brandeis in *Collins* v. *Loisel*, *supra*, 262 U.S. at 429, that "[t]he constitutional provision against double jeopardy can have no application unless a [defendant] has, theretofore, been placed [in jeopardy]."[9]

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where the Court of Appeals for the Second Circuit held that the Double Jeopardy Clause barred an appeal, it expressly left open the issue whether a similar result would apply to a pretrial order dismissing an indictment on the merits (490 F.2d at 880). Subsequently, in *United States* v. *Velazquez*, 490 F.2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6193), the court of appeals held that an appeal from a pre-trial order similar to that in the instant case was not barred by the Double Jeopardy Clause.

[9] *United States* v. *Brewster*, 408 U.S. 501, upon which petitioner relies (Br. 9), is likewise inapposite because it dealt solely with the issue whether "this Court has jurisdiction under 18 U.S.C. § 3731 (1964 ed., Supp. V) to review the District Court's [pretrial] dismissal" of the indictment (408 U.S. at 504-505). In resolving this issue, and in ultimately sustaining its jurisdiction to hear the appeal by the United States, the Court in *Brewster* relied upon language in *Sisson* that, under the former Section 3731, an appeal would not lie from a dismissal "on the basis of facts that would necessarily be tried with the general issue in the case" (399 U.S. at 301).

Since that portion of the opinion in *Sisson* was based solely on the old Criminal Appeals Act, it is not relevant here. Indeed, in *United States* v. *Findley*, *supra*, cited with approval in *Brewster* (408 U.S. at 506) and relied upon by petitioner (Br. 9-10), the First Circuit characterized the holding in *Sisson* as follows (439 F.2d at 973):

> Collectively we believe this [the rationale of *Sisson*] was an approach not in terms of double jeopardy, but in terms of the kind of error section 3731 was intended to cover.

B. Allowance of Government Appeals From Pretrial Dismissal Orders Is Consistent with the Purposes of the Double Jeopardy Clause

A consideration of the nature and the purposes of the Double Jeopardy Clause clearly establishes that its objectives are fully consistent with the accepted and long-standing constitutional precedents discussed above permitting a government appeal in cases such as this.

The Double Jeopardy Clause was intended to protect an individual from being subjected to trial and possible conviction more than once for the same offense. A power "to subject the individual to repeated prosecutions for the same offense," as the Court held in *United States* v. *Jorn*, 400 U.S. 470, 479, "would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which *a criminal trial* represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws" (emphasis added). These considerations were summarized by Mr. Justice Black in *Green* v. *United States*, 355 U.S. 184, 187-188, where, writing for the Court, he observed:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected *to the hazards of trial and possible conviction more than once for an alleged offense.* In his Commentaries, which

greatly influenced the generation that adopted the Constitution, Blackstone recorded:

> ". . . the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."

Substantially the same view was taken by this Court in *Ex parte Lange*, 18 Wall. 163, at 169:

> "The common law not only prohibited a second punishment for the same offence, but it went further and forbid *a second trial* for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [Emphasis added; footnotes omitted.]

These considerations "have led this Court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States* v. *Jorn*, *supra*, 400 U.S. at 479.

Applying this basic rule, and the considerations that led the Court to adopt it, it is plain that petitioner here was not in jeopardy of conviction during the hearing and determination of the motion to dismiss the indictment. Petitioner had yet to be tried on the offense for which he was indicted. Since neither he nor the United States had consented to waive trial by jury, the district court was without power under the Constitution to make any determination regarding petitioner's guilt or innocence or to conduct a trial on any disputed factual issue (*Patton* v. *United States*, 281 U.S. 276, 312; see also Fed. R. Crim. P., Rules 12 and 23).

Moreover, the hearing and determination of the motion to dismiss cannot be characterized as a trial, because there were no disputed issues of fact that had to be tried or resolved. All of the material facts were uncontroverted and established by petitioner's affidavit and by the documents (the authenticity of which was not challenged) contained in his Selective Service file. Petitioner admittedly failed to report for induction as ordered; he concededly filed a post-induction-order claim for treatment as a conscientious objector, and the local board concededly refused to reopen his classification for the reasons stated in the Selective Service File. The only controversy resolved by the district court was the purely legal issue whether the allegedly improper manner by which the local board declined to reopen petitioner's classification would constitute a defense to the indictment.

Under these circumstances, it is apparent that none of the crucial policy consideration reflected by the Double Jeopardy Clause are implicated here. Peti-

tioner was not subjected to the "heavy personal strain which a criminal trial represents for the individual," nor was he subject to the "embarrassment, expense and ordeal" of a trial. Moreover, there is no possibility that, even though innocent, he has been sapped of "the stamina or resources" effectively to face the trial that the court of appeals directed here. See Friedland, *Double Jeopardy* 4 (1969).[10] Indeed, petitioner's motion to postpone the trial until the determination of the motion to dismiss shows clearly—if any such showing is necessary—that petitioner was fully aware of the limited nature of the proceedings involved in the hearing and determination of his motion to dismiss. There is, therefore, no basis for petitioner's claim that constructively "jeopardy had attached."

C. Petitioner Has Advanced No Convincing Arguments For Overruling The Well Settled Principle That Jeopardy Does Not Attach Until A Trial Has Commenced

Petitioner's brief largely ignores the overwhelming authority sustaining the right of the United States to appeal from the pretrial order dismissing the indictment here. The arguments he does advance are principally derived from the opinions of some courts

[10] Certainly there was far less of a "trial" here than is frequently present when a hearing is held on a pretrial motion to suppress evidence, which often involves disputed issues of fact and where the outcome of the hearing may well determine whether there is going to be a trial. Yet it has never been suggested that an appeal from the granting of such a motion is barred by the Double Jeopardy Clause.

of appeals which have held or suggested that the Double Jeopardy Clause does not permit an appeal from a pretrial order dismissing an indictment on the merits. These cases have suggested, among other things, (1) that jeopardy attaches to an acquittal; (2) that the doctrine of *res judicata*, which is applicable to criminal as well as civil proceedings, bars an appeal by a party from an adverse judgment; (3) that the Double Jeopardy Clause was not intended to limit the number of times a defendant may be summoned into court on a single offense, but rather the number of times he may be required to submit proof of his innocence to challenge by the prosecution; and (4) that permitting an appeal from a pretrial order will only encourage defendants to delay their motions to dismiss until jeopardy has attached.

These theories are unsound as a matter of law and policy, and their adoption to bar an appeal from the pretrial order here would involve a repudiation of virtually every relevant opinion of this Court construing the Double Jeopardy Clause.

a. The leading case supporting petitioner's claim, which has been followed by some courts of appeals and rejected by others, is *United States* v. *Ponto*, 454 F.2d 657 (C.A. 7; rehearing *en banc*). There, as here, the defendant was indicted for failing to report for induction as ordered. He moved to dismiss the indictment prior to trial on the basis of a defense that was supported by the undisputed facts contained in his Selective Service File. The motion to dismiss was

granted, and the United States appealed to the court of appeals pursuant to the old Criminal Appeals Act.

By a vote of 5 to 4, the Court of Appeals for the Seventh Circuit construed the old Criminal Appeals Act to preclude an appeal by the United States. The plurality opinion, on behalf of three judges, alternatively held that an appeal was barred by the Double Jeopardy Clause (454 F.2d at 663-664):

> Since the dismissal order was based on a determination on the merits, it was an acquittal to which jeopardy attached. *United States* v. *Sisson, supra*, 399 U.S. at 289-290, 90 S.Ct. 2117; *United States* v. *Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L. Ed. 300 (1896); *Green* v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957); *Helvering* v. *Mitchell*, 303 U.S. 391, 398, 58 S.Ct. 630, 82 L. Ed. 917 (1938). See *United States* v. *Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L.Ed. 2d 543 (1971). Thus, government appeal from this ruling would violate the double jeopardy clause of the Fifth Amendment since a retrial on the charge would be prohibited. *Kepner* v. *United States*, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); *United States* v. *Ball, supra*. We view this as an independent ground for holding that the government may not appeal in this case [footnote omitted].[11]

[11] *Accord: United States* v. *Southern Railway Co.*, 485 F.2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F.2d 606 (C.A. 6); *United States* v. *McCreery*, 473 F.2d 1381 (C.A. 7); *United States* v. *Lewis*, 492 F.2d 126 (C.A. 5). *Contra: United States* v. *Velazquez*, 490 F.2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6493); *United States* v. *Martin Linen Supply Co.*, 485 F.2d 1143 (C.A. 5), certiorari denied, February 19, 1974, No. 73-743; *United States* v. *Brown*, 481 F.2d 1035, 1041 (C.A. 8).

This analysis is based upon a number of erroneous assumptions.

The suggestion that jeopardy "attaches to an acquittal" is fundamentally inconsistent with every decision of this Court construing the Double Jeopardy Clause. Indeed, in *Green* v. *United States*, 355 U.S. 184, 188, the Court spoke of an acquittal as "ending a defendant's jeopardy," which, of course, had attached upon the commencement of trial. *United States* v. *Sisson, supra*, as we have shown, did not hold otherwise. The dictum relied upon by the court of appeals in *Ponto* merely states that an acquittal entered *after* jeopardy had attached barred an appeal. Moreover, as we have shown, the Double Jeopardy Clause—in which the word acquittal is nowhere to be found—was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense" (*Green* v. *United States, supra*, 355 U.S. at 187), and this protection is afforded regardless of whether a defendant has been acquitted *or* convicted. Because jeopardy is deemed to attach upon the empanelling of a jury (or the taking of evidence where a jury trial has been waived), rather than upon the return of a verdict, the Double Jeopardy Clause affords protection against a second trial even where the first trial did not end in an acquittal or conviction, if it was terminated improperly prior to a verdict.

Accordingly, to the extent that an appeal from an "acquittal" is barred by the Double Jeopardy Clause, it is only where the "acquittal" has been returned by the trier of fact, and a ruling against the defendant on appeal would require a "retrial." [12] The point was emphasized in *Green* v. *United States*, *supra*, cited by the court of appeals in *Ponto*, where it was stated (355 U.S. at 188):

> In accordance with this philosophy [underlying the Double Jeopardy Clause] it has long been settled under the Fifth Amendment that a *verdict* of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *United States* v. *Ball*, 163 U.S. 662, 671. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. *United States* v. *Ball*, *supra*; *Peters* v. *Hobby*, 349 U.S. 331, 344-345. Cf. *Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Sanges*, 144 U.S. 310.[13]

[12] The English rule, from which the Double Jeopardy Clause was derived, is to the same effect. "[T]he common law plea of *autrefoits acquit* was based on a verdict of a jury, and not on the 'equivalent of an acquittal.'" Kirk, *"Jeopardy" During The Period Of The Year Books*, 82 U. Pa. L. Rev. 602, 603-604 (1934). The English common law rule would permit a retrial whenever the trial was terminated prior to verdict regardless of the reason for termination.

[13] The other cases cited by the court of appeals (except for the *Sisson* dictum) are likewise to the same effect.

While the court of appeals in *Ponto* recognized that it is the prohibition against a "retrial" that bars an appeal from a verdict of acquittal (it held that an "appeal from this ruling would violate the double jeopardy clause * * * since a retrial on the charge would be prohibited" (454 F.2d at 664)), it completely ignored the fact that the defendant had never been tried on the indictment and had never been placed in jeopardy of conviction. A successful appeal, therefore, could not have resulted in a "retrial." Accordingly, Ponto was not only never in jeopardy, as that term has been applied, but none of the considerations of policy reflected by the Double Jeopardy Clause, discussed above, were implicated by the appeal taken by the United States from the pretrial order dismissing his indictment.

It is not surprising, in light of these facts, that the reasoning in *Ponto*, set out and discussed above, did not command a majority of the court of appeals,[14] and that it has been distinguished by recent cases to the point where the Seventh Circuit recently indicated that "the present viability of *Ponto*" is an open question. *United States* v. *Williams*, 491 F.2d 1233, 1234 (C.A. 7); *United States* v. *Walker*, 489 F.2d 1353 (C.A. 7).[15]

[14] Only three of five judges who formed the majority in *Ponto* agreed that the Double Jeopardy Clause barred an appeal because the order of dismissal was "an acquittal to which jeopardy attached."

[15] In *Walker* and *Williams*, the Court of Appeals for the Seventh Circuit held that the rationale of *Ponto* was applicable

b. A second line of authority relied upon by petitioner is represented by the concurring opinion in *United States* v. *Ponto*, *supra*, and by *United States* v. *Hill*, 473 F.2d 759 (C.A. 9). In *Ponto*, two of the five judges concurred on the ground that "the order of the district court appealed from was a dismissal with prejudice and had the effect of barring a second prosecution. *White* v. *United States*, 126 U.S. App. D.C. 309, 377 F.2d 948 (1967); see *United States* v. *Oppenheimer*, 242 U.S. 85, 87, 37 S.Ct. 68, 61 L. Ed. 161, 1916" (454 F.2d at 665).

Similarly, in *United States* v. *Hill*, *supra*, which involved an obscenity prosecution, the defendant moved to dismiss the indictment prior to trial on the ground that the materials were not obscene. A pretrial "hearing" was held at which the defendants

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to a pretrial order dismissing an indictment on the merits only where the order, in effect, "sustained the merits of an affirmative defense." *United States* v. *Walker*, *supra*, 489 F.2d at 1335; *United States* v. *Williams*, *supra*, 491 F.2d at 1234, n.2. The rationale was held to be inapplicable where the dismissal of the indictment is based upon a stipulated set of facts in which the government "reveals the facts it is prepared to prove" (489 F.2d at 1356). Such a dismissal, the court of appeals reasoned, was in effect a determination of the sufficiency of the charge in the indictment and appealable (*ibid.*, citing *United States* v. *Fruehauf*, 365 U.S. 146, 157-158).

While *Walker* and *Williams* are factually distinguishable from *Ponto* on those grounds, it is difficult to rationalize the distinction on the basis of the purpose of the Double Jeopardy Clause and the policies which it reflects. We think it clear, as the court of appeals held in the instant case, that there is "no significant constitutional difference between the two situations" (Pet. App. 25).

"introduced" into evidence the allegedly obscene materials, along with materials (taken from the records of other cases) that had previously been adjudicated as not being obscene. The United States in turn "offered" materials (taken from the record of yet another case) that had been found to be obscene. (See 473 F.2d at 760.) Although a jury trial had not been waived and the district court was incapable of entering a judgment of acquittal or conviction as a result of the hearing, and although no issue of fact was tried, the court of appeals held that appellate review of the "pre-trial determination that the materials * * * were not obscene as a matter of law" (473 F.2d at 760-761) could not be obtained by the United States.

In so doing, it relied upon *United States* v. *Oppenheimer*, 242 U.S. 85. There, an indictment had been dismissed on the ground that the charge was barred by the statute of limitations. Subsequently, as the result of an appeal by the United States from a pretrial dismissal of an indictment in another case,[10] it became clear that the dismissal of the indictment against Oppenheimer had been erroneous. A new indictment was then returned against Oppenheimer, and he was convicted. On appeal, the conviction was reversed on the ground that the prior dismissal of the indictment on the merits was *res judicata* and barred a subsequent prosecution for the same offense.

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[10] *United States* v. *Rabinowich*, 238 U.S. 78.

Speaking for the Court, Mr. Justice Holmes wrote (242 U.S. at 87):

> A plea of the statute of limitations is a plea to the merits, *United States* v. *Barber*, 219 U.S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a latter prosecution. * * *

The Court specifically recognized that its ruling was not based on the Double Jeopardy Clause, which, since judgment had been rendered prior to trial, was by its terms inapplicable to bar a subsequent indictment. Instead the Court held that the doctrine of *res judicata* was applicable to criminal as well as civil cases (*id.* at 88):

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

The principal defect in the reasoning in *Hill* and the concurring opinion in *Ponto*, and in the reliance of both upon *United States* v. *Oppenheimer*, *supra*, is that it is based upon a fundamental misconception of the doctrine of *res judicata*. While it may be that a pretrial dismissal of an indictment on the merits—once final—bars a second indictment for the same offense,

it has never been held that an appeal from the dismissal of the original indictment, which seeks its reinstatement, is similarly barred. So, for example, while in *United States* v. *Oppenheimer*, 242 U.S. 85, it was held that under the doctrine of *res judicata* a final (unappealed) order dismissing an indictment on statute of limitations grounds barred a second prosecution for the same offense, this Court (before and after *Oppenheimer*) has entertained appeals from pretrial orders dismissing indictments on statute of limitations grounds. *United States* v. *Goldman*, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Barber*, 219 U.S. 72, 77-78. See also *United States* v. *Zisblatt*, 172 F.2d 740 (C.A. 2), appeal dismissed, 336 U.S. 934. Similarly, while it was held in *White* v. *United States*, 377 F.2d 948 (C.A.D.C.) (cited in the concurring opinion in *Ponto*), that a pretrial (unappealed) order dismissing an indictment with prejudice because of unnecessary delay in prosecution barred a second indictment for the same offense, this Court has held that an order dismissing an indictment on those grounds is appealable. *United States* v. *Marion*, 404 U.S. 307.

Indeed, the "fundamental principle of justice" in the civil law that Mr. Justice Holmes applied in *United States* v. *Oppenheimer*, the doctrine of *res judicata*, assumes the right of a party to appeal from an adverse judgment; and if the judgment is reversed by an appellate court, "it is no longer conclusive between *the parties*." ALI, *Restatement of the Law of Judgments*, § 41(d), p. 163 (1942). Cf. *United States* v.

Kepner, 195 U.S. 100, 134-137 (Holmes, J. dissenting). Were it otherwise, the entire jurisdiction of appellate courts would be eradicated by the doctrine of *res judicata*.

Moreover, not only did the decision in *Hill* and the concurring opinion in *Ponto* completely misapply the doctrine of *res judicata*, they also ignored the fact that this doctrine as applied to pre-jeopardy rulings on the merits is not mandated by the Double Jeopardy Clause, but is simply a common law rule of procedure that Congress is entirely free to modify by statute.[17] And it has done so here.

It is no answer to say, as the majority did in *Hill*, that while "[i]t may be that in *Oppenheimer* the Court was applying *res judicata* or collateral estoppel rather than, or as much as, double jeopardy, although that is by no means clear,[18] [t]he distinction, if any, is immaterial" because *Ashe* v. *Swenson*, 397 U.S. 436, 445, subsequently held that "the principle of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy" (473 F.2d

[17] Arguably, allowing a successive number of indictments without limitation, where previous indictment have been dismissed on the merits, may raise due process problems. Such problems, however, are not presented by permitting a single appeal from a pretrial order dismissing an indictment on the merits. See *Palko* v. *Connecticut*, 302 U.S. 319.

[18] Although it was "by no means clear" to the court of appeals in *Hill*, subsequent opinions of this Court have consistently treated *Oppenheimer* as applying the doctrine of *res judicata*. See *United States* v. *Jorn*, 400 U.S. 470, 475, n. 5; *Ashe* v. *Swenson*, 397 U.S. 436, 443; *United States* v. *Adams*, 281 U.S. 202, 205; *Collins* v. *Loisel*, 262 U.S. 426, 430.

at 762). *Ashe* v. *Swenson* merely held that, when a verdict of acquittal entered by a jury necessarily determined certain facts in favor of an accused, the Double Jeopardy Clause could not be avoided by charging the defendant with another offense the proof of which required relitigation of the same factual issue that the prior proceeding, in which he had been placed in jeopardy, had resolved in the defendant's favor.[19] It does not follow from this that an appeal from the termination of the prosecution prior to trial, before jeopardy attached, is barred. Indeed, it is a settled part of the doctrine of collateral estoppel that "[i]f a judgment rendered by a court of first instance is reversed by the appellate court and a final judgment is entered by the appellate court or by the court of first instance in pursuance of the mandate of the appellate court, this latter judgment is conclusive between the parties." ALI, *Restatement of Judgments*, § 69, p. 315 (1942); *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 99, n. 6.

In sum, the rationale of *United States* v. *Hill* and of the concurring opinion in *Ponto* is as unsound as the rationale of the plurality opinion in *Ponto* and the cases that have followed it. Neither affords a sound basis for overturning the settled doctrine that

[19] The issue in *Ashe* v. *Swenson* was stated by the Court in the following way (397 U.S. at 446):

> The question is * * * simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the state could constitutionally hale him before a new jury to litigate that issue again.

jeopardy does not attach until a trial has begun, and that an appeal from a pretrial order of dismissal on the merits is not barred by the Double Jeopardy Clause.

c. A third source of authority invoked by petitioner is *United States* v. *Velazquez*, 490 F.2d 29 (C.A. 2), petition for a writ of certiorari pending (No. 73-6493). Although the court of appeals there held, in a case closely resembling the instant case on its facts, that the Double Jeopardy Clause did not bar an appeal, petitioner relies on the reasoning of the majority opinion in *Velazquez* in support of his position here. That opinion stated (490 F.2d at 34):

> The underlying thrust of the protection against double jeopardy is thus not to limit the number of times a defendant may be summoned into court on a single offense. Under present law this may be done repeatedly. It is rather to limit to one the number of times that a defendant may be required to submit proof of his innocence to challenge or acceptance by the other side. This expresses the root function of the trial as a proceeding where litigants are to be heard before a neutral tribunal, where they appear and argue as adversaries and where their case is to be subjected to public scrutiny and is open to rebuttal. It is multiple trials in this sense which the double jeopardy clause is designed to prevent. [Footnote omitted.]

Holding that the Double Jeopardy Clause did not bar an appeal from the order dismissing the indictment against Velazquez, the court of appeals observed (*id.* at 34-35):

> The district court's granting of Velazquez' motion presented a different situation. There was no trial. There was no evidentiary hearing. There was, in fact, no introduction of evidence as commonly understood in our adversarial system. There was no stipulation of facts. Rather the court went to the motion papers of the defendant, which included copies of entries in his Selective Service record, and without giving either side an opportunity to be heard, and without even having the defendant appear in open court, concluded as a matter of law that the defendant had been deprived of due process * * * [and that the indictment should be dismissed].

Since a different result would presumably have followed in *Velazquez* if the Selective Service file had been "offered" in evidence at a hearing or if the parties had stipulated to the facts,[20] petitioner argues that *Velazquez's* reasoning is applicable to the instant case because the United States Attorney conceded at oral argument that petitioner's letter to his local board—which was part of the Selective Service file—established a prima facie claim for treat-

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[20] The court of appeals' reasoning regarding a dismissal on the basis of stipulated facts was as follows (490 F.2d at 34, n.16):

> That an adjudication on stipulated facts would bar retrial is in keeping with this policy of openness. In such an instance facts have again been offered to the other side and made part of the public record, with the only difference that instead of inviting challenge they have engendered acquiescence. But at least both sides have had the opportunity to pass upon them in the process of submission to the court. * * *

ment as a conscientious objector (Br. 9). But this was not a stipulation of fact; it was simply a concession regarding the legal consequences of an undisputed fact.

In any event, the "ethereal quality of the distinction drawn by the *Velazquez* majority," as Chief Judge Kaufman aptly phrased it in his dissenting opinion in *Velazquez* (490 F.2d at 41),[21] is based largely on a misunderstanding of the purpose of the Double Jeopardy Clause and a patently erroneous reading of the holdings of this Court.

Without belaboring what was said earlier, jeopardy does not attach until a trial has begun before a trier of facts capable of convicting the defendant of the crime charged.[22] *Velazquez* suggests that a hearing on

[21] Chief Judge Kaufman would have adopted the *Ponto* rationale and would have dismissed the appeal because the order of the district court was an "acquittal." It is fundamental," he observed, "that a defendant, once acquitted, may not *again* be placed in jeopardy for the same alleged crime" (490 F.2d 39, emphasis added). Chief Judge Kaufman, however, did not explain when Velazquez had been *initially* placed in jeopardy.

[22] The court of appeals in *Velazquez* observed (490 F.2d at 33):

> The Supreme Court has recently cautioned that the question of assessing whether jeopardy attaches is not to be decided by any mechanical test. *Illinois* v. *Somerville*, 410 U.S. 458 * * * (1973); *United States* v. *Jorn*, 400 U.S. 470 * * * (1971); *United States* v. *Sisson*, 399 U.S. 267 * * * (1970). Accordingly, it is not wholly dispositive of the claim raised by Velazquez to state that since the jury was neither waived nor empaneled, jeopardy could not have attached, although this gives rise to a strong presumption. * * *

a pretrial motion to dismiss is to be deemed a "trial" to which jeopardy attaches when it takes the form of a "hearing before a neutral tribunal, where [the parties] appear and argue as adversaries, and where their case is to be subject to public scrutiny." This cannot be correct, however; if it were, then it would logically follow that, even upon the *denial* of such a pretrial motion to dismiss—after oral argument on the motion or upon a stipulated set of facts—the defendant could not be tried, despite the conclusion of the district court that he has no defense to the indictment, because the trial itself would constitute a second jeopardy. Such a result is absurd because in reality—whatever the nature of the pretrial proceedings—the parties are simply agreeing to the facts for the limited purpose of resolving a controlling issue of law without going through the burden, expense, and emotional strain of a trial.

We disagree. We have already demonstrated that the test for determining when jeopardy has attached—the commencement of a trial reflects the considerations underlying the Double Jeopardy Clause. Accordingly while clear and precise, it is not "mechanical" in any invidious sense. Moreover, there is nothing in any of the cases cited by the court of appeals which questions that basic test. *Sisson* and *Jorn* both involved orders entered after the commencement of trial, and both restated the settled rule. *Somerville* merely cautioned that there is no "mechanical formula by which to judge the propriety of declaring a mistrial" after jeopardy attached (410 U.S. at 462). It did not question the settled rule "that jeopardy 'attached' when the first jury was selected and sworn" (410 U.S. at 467).

Moreover, even assuming the rationale of *Velazquez* is otherwise valid, it is difficult to understand how a defendant who takes advantage of such a pretrial motion has been "required to submit proof of his innocence" (490 F.2d at 34). Not only is the pretrial proceeding initiated by the defendant, but (depending on the resolution of the legal issue) the proof he submits may establish his guilt rather than his innocence. In the instant case, for example, as is true in most selective service cases, the principal "proof" is the Selective Service file. That file establishes conclusively that petitioner failed to report for induction as ordered. Whether it also establishes a defense to the charge depends upon the resolution of the legal issue, which is the only subject of controversy. There is no reason in law or policy why the district court should have unreviewable authority to resolve that issue.

Indeed, had petitioner been convicted after a trial, and had the court of appeals reversed the judgment of conviction (on the same grounds relied upon by the district court), there would be no doubt about the right of the United States to seek further review. Yet petitioner argues, and *Velazquez* suggests, that an appeal from a pretrial order dismissing an indictment may be barred by the Double Jeopardy Clause. Such anomalous reasoning hardly justifies a departure from the settled construction of the Double Jeopardy Clause upon which the court below relied in upholding the right of the United States to appeal from the pretrial order dismissing the indictment.

The final authority relied upon by petitioner is *United States* v. *Findley*, 439 F.2d 970 (C.A. 1), which was decided under the pre-1971 version of the Criminal Appeals Act. There the court of appeals suggested that as a matter of policy it was unwise to permit appeals from pretrial orders granting dismissals (*id.* at 974):

> * * * If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal. We will not adopt such a penalizing construction of the statute.

This consideration of policy, which the court of appeals found persuasive in construing the *old* Criminal Appeals Act, is beside the point here, since it is clear that Congress intended to overrule cases such as *Findley* when it amended the Act in 1971.

In addition, there is a fundamental defect in the reasoning of the court of appeals in *Findley*. It assumes—we believe erroneously—that a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense may assert the Double Jeopardy Clause as a bar to an appeal from a ruling in his favor. But since, in these circum-

stances, it is the defendant who has effectively (and unnecessarily) placed himself in jeopardy, he should be in no better position to invoke the Double Jeopardy Clause than a defendant who moves for a mistrial based on an event that ocurs at trial and over which he had no control. Such a motion, at least where delayed deliberately, would clearly be encompassed within the well-settled rule that "where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution." *United States* v. *Jorn*, *supra*, 400 U.S. at 485.[22]

Moreover, even if the Double Jeopardy Clause could be invoked in such a case, Congress, or this Court through its rulemaking power (18 U.S.C. 3771), could eliminate the problem about which the *Findley* court was concerned by providing that all legal claims and defenses that are known to the defendant prior to trial and are based upon undisputed facts *must* be raised prior to trial. A delay in asserting such a claim could either result in a waiver of the claim (see *Davis* v. *United States*, 411 U.S. 233) or a termination of the trial to permit an appeal by the United States if the trial judge rules in favor of the defendant. See *United States* v. *Moon*, 491 F.2d 1047 (C.A. 5). Under such circumstances,

[22] In fact, in *United States* v. *Jorn*, *supra*, 400 U.S. at 477, n. 6, the plurality opinion clearly intimated that the present Section 3731, which authorizes appeals from post-jeopardy dismissals, would "deal with the problem" raised by the court of appeals in *Findley*.

the "defendant's valued right to have his trial completed by a particular tribunal must * * * be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684. See also *Simmons* v. *United States*, 142 U.S. 148; *Thompson* v. *United States*, 155 U.S. 271; *Gori* v. *United States*, 367 U.S. 364; *Illinois* v. *Somerville*, 410 U.S. 458.

Accordingly, there are no legitimate considerations of policy—even assuming such considerations should affect the decision of this issue—that would justify depriving the United States of its right to appeal from pretrial orders dismissing indictments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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